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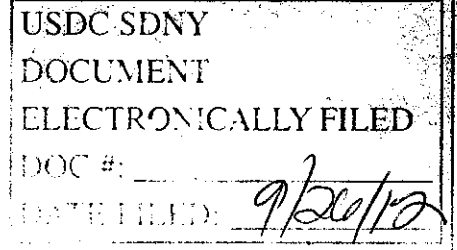
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September 25, 2012

VIA FACSIMILE TRANSMITTAL (914.390.4278)

The Honorable Cathy Seibel
United States District Court, S.D.N.Y.
300 Quarropas Street
White Plains, New York 10601



Re: *Bais Yaakov of Spring Valley v. Alloy, Inc. and Chanel One, LLC*
12-CV-00581 (CS) (GAY)

Your Honor:

On behalf of the defendants, I am writing to respond to Plaintiff's September 20, 2012 letter informing the Court of *Bank v. Spark Energy Holdings, LLC*, 2012 WL 4097749 (S.D. Tex. Sept. 13, 2012). The decision is irrelevant because:

- The defendant in that case claimed that New York substantive law applied in light of *diversity jurisdiction*. 2012 WL 4097749, * 2. That is not our argument. We acknowledge the Court has federal question jurisdiction. The TCPA, however, authorizes lawsuits only "if otherwise permitted by the laws or rules of a State. . . ." 47 U.S.C. § 227(b)(3). It is the TCPA, via its incorporation of NY CPLR § 901(b), that prevents this case from proceeding as a putative class action. The *Bank* court did not address that argument.
- The *Bank* decision, like all the other district court decisions cited by Plaintiff after briefing on the defendants' motion to dismiss/strike had closed, is not binding on this Court (and even if it were, it does not address the defendants' argument in this case).
- Plaintiff continues to ignore binding Second Circuit precedent on this point. See *Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 591-92 (2d Cir. 2011) ("Indeed, as we recently stated, the 'otherwise permitted' provision is 'a delegation to Congress to the states of considerable power to determine which causes of action lie under the TCPA.'" (quoting *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010), cert. denied, 131 S.Ct. 2151 (2011))). It is true these cases preceded the Supreme Court's decision in *Mims*. *Mims v. Arrow Fin. Servs., LLC*, 132 S.Ct. 740, 753 (2012). *Mims*, however, narrowly held that federal question jurisdiction exists over TCPA claims. *Mims* did not overturn Second Circuit authority holding that TCPA claims cannot proceed as class actions in New York federal courts.

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- The plaintiff in *Giovanniello* sought reconsideration of the Second Circuit's rationale in light of *Mims*. See *Giovanniello v. ALM Media, LLC*, No. 10-3854 (2d Cir.) Order (ECF No. 117). The Second Circuit rejected that request. *Id.* Not so coincidentally, the lawyer who represented the plaintiff (himself) in the *Bank* case (Todd C. Bank) also is counsel for the plaintiff in the *Giovanniello* case. He currently is seeking *certiorari* from the U.S. Supreme Court in *Giovanniello*. See Supreme Court Docket No. 11-1411, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1411.htm>. The briefing on the petition for *certiorari* was distributed for conference on September 24, 2012. A decision on the petition for *certiorari* presumably soon will follow.
- *Giovanniello* and its rationale still stand. As such, this case should not proceed as a putative class action.

Sincerely,

LATHROP & GAGE LLP

By:


Blaine C. Kimrey

BCK

cc: Aytan Bellin, Esq. (counsel for Plaintiff)
Suzanna Morales, Esq.
Jeffery S. Davis, Esq.

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